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in the Supreme Court of the United States

OCTOBER TERM, 1976

NO. 76-1364

ALLAN H. APPLESTEIN,

Petitioner

vs.

GUSTAVE SIMONS,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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OCTOBER TERM, 1976

NO. _____

ALLAN H. APPLESTEIN,

Petitioner

vs.

GUSTAVE SIMONS,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

The petitioner Allan H. Applestein prays that a writ of certiorari issue to review the judgment of the Court of Appeals of the State of New York entered on January 13, 1977 in an action by the respondent Gustave Simons against the petitioner originating in the Supreme Court of the State of New York, County of New York, bearing index number 12349-1964.

OPINIONS BELOW

The decision of the New York Court of Appeals of which review is sought is not yet reported. The decision made three dispositions:

1. In its final paragraph it dismissed an appeal taken as of right "upon the ground that no substantial constitutional question is directly involved". It is this determination of which review is sought. It left undisturbed an order which had been rendered by the New York Supreme Court, Appellate Division, on March 3, 1975 reported without opinion as *Simons v. Applestein*, 367 N.Y.S.2d 732, case No. 2, affirming an unreported decision of the New York Supreme Court contained in the appendix to this petition at pages App. 3, 4 and 5.

2. In the first decretal paragraph of its decision the New York Court of Appeals also dismissed a motion (made simultaneously with the appeal taken as of right) for permission to appeal the same order of the Appellate Division dated March 3, 1975, upon the grounds that the latter order did not (at the time it was made) finally determine the action; but that paragraph did not dispose of or bar the aforesaid appeal taken as of right from the subsequent 1976 final judgment, which appeal as of right was (as aforementioned) disposed of and dismissed in the final paragraph.

3. The New York Court of Appeals decision also, in its first decretal paragraph, denied a motion for permission to appeal an intermediate appellate decision affirming the judgment entered after trial, reported as *Simons v. Applestein*, 1976, 387 N.Y.S.2d 399 and appended hereto at page App. 20.

JURISDICTION

The decision of the New York Court of Appeals of which review is sought is dated and was entered in that court on January 13, 1977. The judgment of the New York Supreme Court upon remittitur from the Court of Appeals was entered on January 24, 1977.

Jurisdiction to review the judgment in question is conferred on this court by 28 U.S.C. Section 1257(3), in that a right, privilege or immunity is specially set up or claimed under the Constitution of the United States; and in that such right, privilege or immunity has or have been denied to the petitioner by invalid application or non-application of a State statute under the decision of which review is sought.

QUESTIONS PRESENTED FOR REVIEW

1. In an action in a State court against a non-domiciliary of that State who was not personally served with process but whose property within the State was attached, is a right, privilege or immunity to make only a limited appearance to defend the action on the merits only to the extent of the value of the attached property, without a general appearance and submission to personal jurisdiction, a constitutional requirement of due process of law?

2. In an action in a State court against a non-domiciliary of that State who was not personally served with process but whose property within the State was attached, is a rule unconstitutional if it makes an appearance to defend the action on the merits a general appearance and submission to personal jurisdiction, and forces the defendant to choose between abandonment of his prop-

erty without defense, or submission to personal jurisdiction; and does an attempt to force a defendant to make such a choice contravene the constitutional guaranty of due process of law?

3. Are New York courts constitutionally required to apply the amendment to New York Civil Practice Law and Rules, rule 320(c)(1), effective September 1, 1969, to an action pending on that date against a non-domiciliary of that State who was not personally served with process but whose property within the State was attached, where that amendment provides in such a case for a limited appearance not equivalent to personal service on the defendant, and granting to the defendant a right, privilege or immunity to defend the action on the merits only to the extent of the value of the attached property without a general appearance and submission to personal jurisdiction?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The petitioner's rights, privileges and immunities are claimed under the due process and equal protection clauses of Amendment XIV, section "1" and Amendment V of the United States Constitution. The petitioner claims that they also govern the application of New York Civil Practice Law and Rules section 314 and rule 320(c), the latter rule as amended effective September 1, 1969, and section 5213:

> "314. Service without the state *not giving personal jurisdiction in certain actions* (emphasis supplied).

> "Service may be made without the state by any person authorized by Section 313 in the same manner as service is made within the state
>
> • • •
>
> "3. where a levy upon property of the person to be served has been made within the state pursuant to an order of attachment or a chattel of such person has been seized in an action to recover a chattel."

> "R.320. Defendants Appearance. • • •
>
> (c) When appearance confers personal jurisdiction, in certain actions; *limited appearance.* When the court's jurisdiction is *not based upon personal service* on the defendant, an appearance is *not* equivalent to personal service upon the defendant:
>
> "1. In a case specified in subdivision (3) of Section 314, if jurisdiction is based solely upon a levy on defendant's property within the state pursuant to an order of attachment. (emphasis supplied)

> §6213. Service of summons.
>
> An order of attachment granted before an action is commenced is valid only if, within sixty days after the order is granted, a summons is served upon the defendant or first publication of the summons against the defendant is made pursuant to an order and publication is subsequently completed, except that a person upon whom the order of attachment is served shall

not be liable for acting upon it as if it were valid without knowledge of the invalidity.

The respondent (plaintiff) attempted to proceed pursuant to the said statutes but did not succeed in making personal service of process anywhere, and failed to make any publication within sixty days after the order was granted or at any time thereafter. The petitioner (defendant) subsequently appeared in the action but contends that his appearance conferred no greater jurisdiction than would have been acquired by successful service outside the state or publication of the summons, namely jurisdiction only quasi in rem, and not in ersonam.

STATEMENT OF THE CASE

Well over five years after supposed accrual in April 1959 of the alleged cause of action, and only months before the period of limitations would have expired, the plaintiff caused his secretary as his assignee to attempt to commence in her own name as plaintiff an action for the alleged reasonable value of supposed legal services claimed to have been rendered by the present plaintiff to the defendant, who is also an attorney admitted to the Maryland Bar.

The defendant is a domiciliary of Florida. He was not served with the summons either personally outside New York or by publication. The plaintiff's secretary attempted to commence the action with an order of attachment and succeeded in attaching a bank deposit of the defendant in New York containing $2,833.52. The plaintiff's secretary however failed to serve the summons personally or to commence publication of the summons within sixty days after the date of the order of attachment as

required by New York Civil Practice Law and Rules ("CPLR") 6213, q.v. supra. The defendant by the attorneys who then represented him, prepared motion papers to vacate the order of attachment by reason of such failure. The defendant's attorneys withdrew the motion and excused the plaintiff's failure to publish the summons or serve it outside New York, and interposed an answer to the complaint, but the defendant claims that he intended thereby to confer no greater jurisdiction on the court than it would have had if the summons had been published or served outside New York, namely jurisdiction quasi in rem. Moreover the defendant bonded back the attachment and discharged it pursuant to CPLR 6222 by means of an affidavit of his attorney which stated that "pursuant to the provisions of Section 6222 of the Civil Practice Law and Rules making this motion does not constitute an appearance in the action by the defendant."

After a mistrial ordered because of jurisdictional issues, followed by jurisdictional motions and a jurisdictional appeal, mentioned below under the heading "Federal questions raised in courts below", the New York Supreme Court, Appellate Division, held that it had acquired jurisdiction in personam over the petitioner (defendant). The action went to trial and a verdict and judgment were rendered against the petitioner, not limited to the value of the attached property which was $2,833.52 plus interest, but for the full amount demanded in the complaint, $33,333.33, which with interest and costs aggregated $68,156.20. Judgment was affirmed by the Appellate Division of the Supreme Court, and the Court of Appeals declined to disturb it by means of the appellate procedures in that court of which review is here sought.

FEDERAL QUESTIONS RAISED BELOW IN COURTS BELOW

The stages in the proceedings in the court of first instance and in the appellate court at which, and the manner in which, the federal questions sought to be reviewed were raised, and the method of raising them and the way in which they were passed upon by the courts, are as follows:

I. Prior to presentment of constitutional issues, jurisdictional issues were first raised in statutory contexts. A trial justice ordered a mistrial because he believed that jurisdiction quasi in rem was absent on the grounds that the present plaintiff's secretary, who had originally attempted to commence the action in her own name as plaintiff, had reassigned the claim back to the present plaintiff prior to the time that she obtained the order of attachment; and since she no longer owned the claim at the time she obtained the attachment, the attachment was thought to be invalid. The plaintiff objected inter alia that the matter was irrelevant because he claimed he had acquired jurisdiction in personam over the defendant. The Justice disregarded that objection and directed that the validity of jurisdiction quasi in rem be tested in a motion part, and ordered the mistrial. In the ensuing motion the plaintiff again objected that he had obtained jurisdiction in personam but the court again disregarded it, a referee reporting that "Jurisdiction herein is predicated on the validity of a warrant of attachment, * * *". The court however then sustained jurisdiction quasi in rem. On a subsequent unrelated motion for leave to amend the complaint the petitioner contended that it could not be

amended because the court lacked jurisdiction in personam, but the motion was denied on other grounds.

II. The constitutional question whether jurisdiction had been acquired only quasi in rem, or in personam, was formally raised by written motion to a Justice to whom the action had been assigned for trial, and the constitutional law was argued in written briefs. The Justice held that jurisdiction in personam had been acquired, and the defendant appealed to the Appellate Division on a printed record and printed briefs. Under appellate practice established in the New York Code of Rules and Regulations ("NYCRR") the questions involved in the appeal are required to be stated in the appellant's brief accompanying the record, 22 NYCRR §600.10(d)(2)(ii). Six such questions were stated, all relating to the same subject raised in this petition for a writ of certiorari. One of the six questions was specifically phrased in constitutional terms as follows:

> "3. Is a limited appearance a constitutional requirement of due process of law where a nondomiciliary defendant whose property is attached is not personally served with process; and is a rule unconstitutional if it makes an appearance on the merits, in an action quasi in rem, a general appearance, and forces the defendant to choose between abandonment of his property without defense, or submission to personal jurisdiction? The court below did not expressly answer the question, but its ruling presupposes a negative answer."

The other five questions were in pari materia. The Appellate Division affirmed the ruling of the Justice to whom the action had been assigned for trial, and the action subsequently proceeded to trial before another Justice and a jury. For the purposes of this writ the record is deemed to consist of the printed record on appeal to the Appellate Division and the accompanying printed brief as required by the aforesaid appellate rule. The aforesaid quotation of the question involved appears on page 2 of the latter brief.

III. After trial an appeal on the merits was taken to the Appellate Division of the Supreme Court which affirmed the judgment. Thereafter permission to appeal to the Court of Appeals was sought from the court by way of "Notice of motion for leave to appeal, affirmation, and appellant's brief", deemed part of the record submitted in support of this application for a writ of certiorari. Pursuant to 22 NYCRR §500.9(a)(2) the same questions of law were presented as had been earlier presented to the Appellate Division, and appear on pages "5" and "6" of the notice of motion. Specifically the question phrased in constitutional terms appears on page "6".

The petitioner simultaneously filed a notice of appeal to the Court of Appeals as a matter of right, and advised that court in its aforesaid motion papers that "The constitutional issue may make the non-final order reviewable as of right, CPLR 5601(d) and (b)(1), 5501(b) second sentence, and we are filing a protective notice of appeal."

The New York Court of Appeals determined the motion for permission to appeal, and the appeal taken as of right, as follows:

> "Motion, insofar as it seeks leave to appeal from the October 12, 1976 Appellate Division order, denied; and insofar as it seeks leave to appeal from the March 3, 1975 Appellate Division order, dismissed upon the ground that the order sought to be appealed from does not finally determine the action within the meaning of the Constitution; with twenty dollars costs and necessary reproduction disbursements.
>
> On the Court's own motion, appeal taken as of right dismissed, without costs, upon the ground that no substantial constitutional question is directly involved."

The petitioner contends on this petition for a writ of certiorari that the New York Court of Appeals erred in determining that no substantial constitutional question is directly involved, and in its failure to reverse the judgment on constitutional grounds.

REASONS FOR ALLOWANCE OF THE WRIT

The viability of the constitutional issue tendered in this petition, which has not yet been resolved by this Court, persists in federal and state courts. Just months ago it was one of three constitutional issues raised before a United States Court of Appeals in *U.S. Industries, Inc. v. Gregg*, 1976, 3 Cir., 540 F.2d 142, where it was defined as, id at 145:

> "4. Whether the denial of an opportunity to make a limited appearance, defending plaintiff's

> claim on the merits with any judgment limited to the value of the seized property, deprived Gregg of due process?"

While the Court of Appeals in reversing the district court and remanding with a direction to dismiss the complaint for want of jurisdiction over the person, predicated its decision primarily on one of the other, albeit closely related, constitutional grounds, it did not fail to take note of the issue here raised and considered its result to be "buttressed" by it, id at 156:

> "While the focus of our attention has been the situs provision of § 169, the result we reach is buttressed by the operation in this case of the rule of Sands v. Lefcourt Realty Corp., supra. Under the interpretation that case gave to the statutory schema, the nonresident defendant is inexorably put to a Hobson's choice: either surrender by default the entire value of the seized property or submit to in personam jurisdiction. Keeping in mind the admonition of Mullane that constitutional standards do not depend on 'elusive and confused' state law classifications, we wonder whether this jurisdiction realistically ought to be considered as quasi in rem. The purpose of the Delaware procedure is to coerce the nonresident to submit to in personam jurisdiction. And it is difficult to conceive of a more potent jurisdiction —irrespective of its label—than the jurisdiction exercised here. Unless Gregg chose to default the $2 million in stock certificates he could have been held personally to answer for a claim in excess of $20 million in a forum unrelated to him or the transaction at issue. Of course, if this case were

> analyzed under an in personam rubric, the conclusion we have reached would follow just as surely."

That conclusion was that the court lacked jurisdiction over the person.

The view that imposition of such a dilemma is unconstitutional has long been supported by scholarly authority, see *Taintor, Foreign Judgment In Rem: Full Faith And Credit Against Res Judicata In Personam*, 8 U. Pitt. L. Rev. 223(1942). As there said by Professor Taintor, id. at 226:

> "It is submitted that an attempt to force defendant to choose between abandonment of his property without defense and submission to the jurisdiction of the court for all purposes contravenes the constitutional guaranty of due process of law."

And as concluded by Professor Taintor, id. at 232:

> "It is submitted that principle and the authorities, so far as they exist, support the conclusion that a rule which makes any appearance on the merits in an action in rem or quasi in rem a general appearance for all purposes is improper and unconstitutional, and that a personal judgment rendered under such duress is without due process of law, and is not entitled to and may not be given full faith and credit."

Indeed the United States Court of Appeals for the Second Circuit has observed that the New York Court of Appeals itself may have been likewise concerned over the constitutionality of the former version of CPLR 320(c) which was in effect when the action at bar was commenced. In *Minichiello v. Rosenberg*, 1969, 2 Cir., 410 F.2d 106, cert. den 396 U.S. 844, reh. den. 396 U.S. 949, Judges Friendly and Feinberg stated, 410 F.2d at 111, footnote 7:

> *** "The Court of Appeals may have entertained qualms about the constitutionality of CPLR §320 (c) both in the *Seider* situation and, as indicated by the last sentence of the quotation, in other instances of *quasi in rem* jurisdiction. There is substantial authority that where the presence of property within the state is the sole basis for jurisdiction, it is unfair to require the defendant to choose between forfeiting this and subjecting himself to liability for a larger claim. See Cheshire Nat'l Bank v. Jaynes, 224 Mass. 14, 112 N.E. 500 (1916); Salmon Falls Mfg. Co. v. Midland Tire & Rubber Co., 285 F. 214 (6 Cir. 1922); McQuillen v. Nat'l Cash Register Co., 112 F.2d 877 (4 Cir.), cert. denied, 311 U.S. 695, 61 S.Ct. 140, 85 L. Ed. 450 (1940); Miller Bros. v. State, 201 Md. 535, 95 A.2d 286 (1953), rev'd on other grounds, 347 U.S. 340, 74 S.Ct. 535, 98 L.Ed. 744 (1954). But see, contra, Campbell v. Murdock, 90 F.Supp. 297 (N.D. Ohio 1950); Anderson v. Benson, 117 F.Supp. 765 (D.Neb.1953); Sands v. Lefcourt Realty Corp., 35 Del.Ch. 340, 117 A.2d 365 (1955); United States v. Balanovski, 236 F.2d 298 (2 Cir. 1956), cert. denied, 352 U.S. 968, 77 S.Ct. 357, 1 L.Ed.2d 322 (1957). Although the commentators are likewise divided, several suggest that to deny the defendant an opportunity to defend without submitting to *in personam* jurisdiction violates due process. See Taintor, Foreign Judgment *in Rem*: Full Faith and Credit v. Res Judicata *in Personam*, 8 U. Pittsburgh L. Rev. 223 (1942); and B. Currie, Attachment and Garnishment in the Federal Courts, 59 Mich.L.Rev. 337, 379-80 (1961); cf. Restatement of Judgments § 40 (1942). But see 2A Moore, Federal Practice ¶12.13 (2d ed. 1948 & Supp. 1967); Blume, Actions Quasi in Rem under Section 1655, Title 28, U.S.C., 50 Mich.L. Rev. 1, 22-24 (1951).

The Second Circuit was there commenting upon the first decision of the New York Court of Appeals which sanctioned a limited appearance, *Simpson v. Loehmann*, 1968, 21 N.Y.2d 990, 290 N.Y.S.2d 914, 238 N.E.2d 319, for the purposes of its judicially created direct action against insurers, *Seider v. Roth*, 1966, 17 N.Y.2d 111, 269 N.Y.S.2d 99, 216 N.E.2d 312. In *Simpson* the New York court held that where no personal jurisdiction had been obtained over the nonresident insured defendant, but only jurisdiction quasi in rem over the contractual obligation of the domestic insurer to defend him, the defendant was entitled to defend the action on the merits *without* submitting to the personal jurisdiction of the court, and that "*the recovery is necessarily limited to the value of the asset attached,* * * * " emphasis supplied), namely the limit of the insurance policy. *The action had been commenced in 1964 -- the same year in which the action at bar was commenced!*

In *Simpson* however the court left open the question whether a limited appearance was applicable to claims other than direct actions against insurers. The following year the New York Judicial Conference responded by enacting its amendment to CPLR 320(c) in the form quoted supra in this petition under the heading "Constitutional and statutory provisions involved", which adopted the presently existing limited appearance. *Simpson* and the statutory amendment, it is submitted, were no mere acts of grace by the Court and Judicial Conference, but were their recognition of constitutional constraint, see *Minichiello* quoted supra. They were a reconciliation with a constitutional right that had always previously existed.

The problem of the action at bar is that it was already pending at the time that the statute was amended to provide for the limited appearance; and that at the time the action was commenced New York imposed the "Hobson's choice", *Olcott v. Mac Lean*, 1878, 73 N.Y. 223; *Brainard v. Brainard*, 1947, 272 App.Div. 575, 74 N.Y.S.2d 1, aff'd 297 N.Y. 916, 79 N.E.2d 744. In its affirmance in *Brainard*, supra, the New York Court of Appeals passed upon federal constitutionality under the Fourteenth Amendment.

It is submitted that New York was then in error in sustaining the federal constitutionality of its Hobson's choice, and that New York, during the pendency of the action at bar, recognized and rectified its error. The issue is whether such rectitude operates only prospectively, or whether New York is constitutionally constrained to apply it to actions already pending and undetermined. We contend the latter. What is now constitutional or unconstitutional, was always so. The action being yet undetermined,

the defendant was still entitled to due process and equal protection of the laws. Equal protection also precludes discrimination based upon any supposed distinction between direct actions against insurers and all other actions.

No problem arises from absence of a special appearance or a protestation that an appearance was limited. Limited appearances are unlike traverses of personal service of a summons, or denials that jurisdiction in rem has been acquired, which may be contested formally by motion or in a responsive pleading. Where there is only a limited appearance in an action against a non-domiciliary quasi in rem, there is nothing to object to formally, because the plaintiff makes no claim that he served the summons personally within the State, and the defendant does not deny that his property was duly attached; so no formal objection is required or applicable. Indeed under New York CPLR 320(c) there is no requirement that any jurisdictional objection be verbally raised in order to have a limited appearance. *The statute is self-executing.* As stated in Professor McLaughlin's practice commentaries to *McKinney's Consolidated Laws of New York*, Volume 7B, following CPLR 320, page 377:

> "Although Restatement, Judgments § 40(a) (1942) states that a defendant who makes a limited appearance must indicate 'that he does not intend thereby to submit himself to the jurisdiction of the court', evidently *this is not so in New York.* The present section delimits the function of an appearance in an attachment case and appears to be *self-executing, requiring no further protestations from the defendant.* See Report to the 1969 Legislature In Relation To the CPLR.

Judicial Conference, State of New York, February 1, 1969, at page 62." (emphasis supplied).

Accordingly a limited appearance, constitutionally required to be available when this action was commenced, needed no formal denial of any jurisdiction, the statute being necessarily retroactive and self executing.

CONCLUSION

New York has denied the petitioner his constitutional guaranty of due process and equal protection of the laws by withholding from him, as a non-domiciliary who was not served with process by any means, an opportunity to make a limited appearance in an action quasi in rem for the purpose of defending title to his attached property on the merits without subjecting himself to personal jurisdiction; by forcing him to choose between abandonment of his property or submission to personal jurisdiction; by purporting to exercise personal jurisdiction over him; and by rendering a personal judgment against him in excess of the value of the attached property.

The New York Court of Appeals erred in its decision that no substantial constitutional question is directly involved. It is respectfully submitted and prayed that a writ of certiorari should issue to review that decision.

Respectfully submitted

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APPENDIX

STATE OF NEW YORK, COURT OF APPEALS

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the Thirteenth day of January A.D. 1977.

PRESENT, HON. CHARLES D. BREITEL, Chief Judge, presiding.

1 Mo. No. 1115

Gustave Simons,

Respondent,

vs.

Allen H. Applestein,

Appellant.

A motion for leave to appeal to the Court of Appeals having heretofore been made upon the part of the appellant herein, papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion, insofar as it seeks leave to appeal from the October 12, 1976 order of the Appellate Division, be and the same hereby is denied; and, insofar as it seeks leave to appeal from the March 3, 1975 order of the Appellate Division, be and the same hereby is dismissed upon the ground that the order sought to be appealed from does not finally determine the action within the meaning of the Constitution; with twenty dollars costs and necessary reproduction disbursements; and it is

ORDERED, on the Court's own motion, that the appeal taken as of right by said appellant be and the same hereby is dismissed, without costs, upon the ground that no substantial constitutional question is directly involved.

/s/ Joseph W. Bellacosa

Joseph W. Bellacosa
Clerk of the Court

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on March 3, 1975.

Present—Hon. Arthur Markewich, Justice Presiding
Francis T. Murphy, Jr.
George Tilzer
Louis J. Capozzoli, Justices.

Affirmance of Order 2060 N

Gustave Simons,
Plaintiff-Respondent
-against-
Allen H. Applestein,
Defendant-Appellant.

An appeal having been taken to this Court by the defendant-appellant from an order of the Supreme Court, New York County, (Baer, J.), entered on October 16, 1974, determining that said Court has in personam jurisdiction over the defendant, and said appeal having been argued by Mr. Sol. I. Sokolsky of counsel for the appellant, and by Mr. Arnold Bennett Glenn of counsel for the respondent; and due deliberation having been had thereon,

It is hereby unanimously ordered that the order so appealed from be and the same is hereby affirmed, and that the respondent recover of the appellant $40 costs and disbursements of this appeal.

ENTER:

HYMAN W. GAMSO
Clerk.

INDIVIDUAL CALENDAR PART 14

New York Supreme Court
County of New York

GUSTAVE SIMONS,
Plaintiff,

—against—

ALLAN H. APPLESTEIN,
Defendant.

(Filed May 6, 1974)

PRESENT:

HON. HAROLD BAER
Justice.

• • •

This decision is in response to the parties request for a ruling as to whether or not this court has in personam jurisdiction or only quasi in rem jurisdiction in the instant action.

In August and September of 1964 the plaintiff obtained an order of attachment on the funds of the defendant which were in New York; service of a summons and complaint was attempted in September of 1964 on the defendant in Florida.

In November of 1964 the defendant's answer was served upon the plaintiff's attorney. Through the long and tortured history of this litigation there has never been a definitive ruling with respect to the nature of the jurisdiction in this matter.

Prior to the amendment of CPLR 320, and in cases other than those involving liability insurance policies (see Simpson v. Loehmann, 21 N.Y.2d 990) a defendant whose property was attached had no right to make a limited appearance. An appearance prior to September 1, 1969 therefore constituted a submission to in personam jurisdiction (see McLaughlin, McKinney's Consolidated Laws, Volume 7B C.320.6 p. 374; Weinstein Korn & Miller, New York Civil Practice Vol. 1 § 320.17 and 320.18).

It is clear that we are bound by the status of the law at the time this action was commenced (Balassa v. Benteler-Werke, 23 A D 2d 664).

Accordingly, we find that in the instant case the defendant has subjected himself to in personam jurisdiction.

Dated May 3, 1974

H.B.
J.S.C.

INDIVIDUAL CALENDAR PART XIV

New York Supreme Court
County of New York

Gustave Simons
—against—

Allan H. Applestein

(Filed October 16, 1974)

PRESENT:

HON. HAROLD BAER
Justice.

Papers Numbered

Notice of Motion and Affidavits Annexed 1-6

Answering Affidavits 7-21

Upon the foregoing papers this Motion is denied in accordance with the memorandum decision of this court dated May 3, 1974.

Dated October 11, 1974

H.B.
J.S.C.

County Clerk's No. 12349, 1964

Spec I Liber 7/77 Line 5, 1974

EXHIBIT "C"
SUPREME COURT OF THE STATE OF NEW YORK,
SPECIAL TERM PART I, NEW YORK COUNTY

at the Courthouse thereof, 60 Centre Street,
New York, New York, 10007

Present:
HON. GEORGE STARKE
Justice.

Anita Yasus
— against —

Allan H. Applestein

(Filed June 19, 1970)

The following papers numbered 1 to 23 read on this motion, SUBMITTED TO illegible

No. 138 on Calendar of June 12, 1970

	Papers Numbered
Notice of Motion - Exhibits and Affidavits Annexed	1-5
—CROSS MOTION Answering Affidavit, Affirmations & Exhibits	6-17
Replying Affidavits - Exhibits	18-20
Rejoinder Affirmations	21-23

Upon the foregoing papers this Motion by defendant to annulling a warrant of attachment, the defendant's bond and to dismiss the complaint and the cross motion to substitute plaintiffs is disposed of as follows.

¶ The crux of the matter herein is a jurisdictional question, centered about when and if the assignments were made, which issue cannot be determined on the papers submitted. The issue as to jurisdiction is therefore referred to the Hon. Gerald Mazur, Special Referee, to hear and report thereon, together with his recommendations. ¶ Counsel are directed to serve a copy of this order within 5 days after publication hereof on the office of the referees, Room 308M, for the purpose of arranging a hearing date. ¶ Determination of the instant matter shall be held in abeyance pending receipt of the referee's report.

Dated June 19, 1970

Briefs: Plaintiff's J.S.C.

County Clerk's No. 12349, 1964

Spec I Liber. Y3 Line 3, 1970

SUPREME COURT : NEW YORK COUNTY

INDEX NO. 12349/64

ANITA YASUS,

Plaintiff,

- against -

ALLAN H. APPLESTEIN,

Defendant.

(Filed June 29, 1971)

TO THE SUPREME COURT, NEW YORK COUNTY, SPECIAL TERM, PART I:

By order dated June 19, 1970 of the Hon. George Starke, one of the Justices of this Court, the issue as to jurisdiction in this matter was referred to me to hear and report with recommendations. Jurisdiction herein is predicated on the validity of a warrant of attachment, and involves questions as to when and if certain assignments were made.

Heretofore, a mistrial of this action was granted on the ground that the plaintiff obstensibly was not the owner of the claim upon which the attachment was obtained, thus creating a serious jurisdictional defect in the proceeding. After mistrial the parties were left to their remedies at Special Term.

The hearing before me was held on February 4, 1971. A transcription of the minutes taken by an official court reporter is filed herewith together with memoranda submitted by the respective parties.

After hearing the testimony herein, observing the demeanor of the witnesses and assessing their credibility, it is my opinion that the following appears to have occurred:

On August 26, 1964 the order of attachment was issued. In support of the application there is an affidavit by plaintiff dated and verified July 29, 1964 in which she refers to an annexed assignment to her of the cause of action "dated this 29th day of July, 1964." The court file discloses, however, that the annexed assignment is dated August 13, 1964.

Plaintiff was then a secretary in the law office of the assignor, Gustave Simon. He was not in the city on July 29, 1964. The cause of action is for legal fees allegedly due Simon.

Whatever the reasons for proceeding in this way, it appears that about the time of the assignment from Simon to plaintiff, a reassignment from plaintiff to Simon dated in blank was prepared. No reason appears in the record for the reassignment, but the explanation in plaintiff's memorandum that this was a security measure against the event that plaintiff might leave Simon's employ, is plausible.

The matter was handled for plaintiff and Simon by one Leonard Kolleeny. The papers apparently were pre-

pared by July 29, 1964, but apparently not used until after Simon's return. The statement by plaintiff as to the date of the assignment was obviously erroneous insofar as any written assignment from Simon was concerned.

This inaccuracy appears to be the cause of a series of further errors committed by Kolleeny which has befuddled the jurisdictional basis of this lawsuit.

Apparently in getting the case ready for trial in February 1970, Kolleeny found copies of the August 13, 1964 assignment as well as copies of the undated reassignment. Since August 13, 1964 did not conform to the statement in plaintiff's July 29, 1964 affidavit, and since the summons and complaint bear the July 29th date, he apparently concluded that the August 13th date was in error and had his secretary erase it and insert July 29, 1964 in its place. He then had his secretary date the reassignment July 30, 1964, a date he says he "arbitrarily" chose.

This made it appear that as of the time of the attachment order, the assignment (July 29th) was superseded by the reassignment (July 30th), thus rendering it jurisdictionally impossible for plaintiff to have obtained the attachment since she was no longer the "owner" of the claim.

I believe that this was the result of unwillful carelessness on the part of Mr. Kolleeny and was neither fraudulently motivated nor done for any reasons of impropriety.

On the basis of the foregoing; it is my conclusion that the assignment from Simon to plaintiff was executed on August 13, 1964 and that at the time the order of attach-

ment was signed, plaintiff was the record owner of the claim. It is also my conclusion that the reassignment was executed sometime considerably after the order of attachment probably prior to plaintiff's termination of her employment in March 1965.

Since the procedure followed in prosecuting this claim appears to be legally permitted and not against public or court policy, it is respectfully recommended that the court deny defendant's motion to annul the warrant of attachment and for ancillary relief.

Respectfully submitted,

GERALD MAZUR
Special Referee.

DATED: June 29, 1971

At a Special Term Part I, of the Supreme Court, New York County held at 60 Centre Street, New York on the 7th day of September, 1971.

PRESENT: HON. GEORGE STARKE

Justice

ANITA YASUS,

Plaintiff.

- against -

ALLAN H. APPLESTEIN,

Defendant.

ORDER

Defendant having moved this Court by Notice of Motion dated July 13, 1971 for an Order rejecting the report of Hon. Gerald Mazur, Special Referee, dated June 29, 1971 and for an Order granting the relief heretofore requested by the defendant in its earlier Notice of Motion dated May 11, 1970 which Motion had been held in abeyance pending the report of the Special Referee; and

Plaintiff having cross-moved this Court by Notice of Motion dated July 15, 1971 for an Order

a. Confirming the report of Hon. Gerald Mazur, Special Referee dated June 29, 1971 and

b. Substituting Gustave Simons as party plaintiff and

c. Restoring this case for trial to the Trial Calendar for a day certain;

And due deliberation having been had thereon and the Court having rendered its decision in writing dated July 30, 1971; it is

NOW, upon reading and filing the aforesaid Notices of Motion and Cross-Motion and upon the Affidavit of Sol I. Sokolsky, Esq., attorney for defendant, sworn to July 9, 1971 in support of the Motion and the exhibits annexed thereto; and upon the Affirmation of Leonard Kolleeny, Esq., attorney for the plaintiff affirmed the 15th day of July 1971 in opposition to the prime motion and in support of the plaintiff's cross-motion and upon the exhibits annexed thereto; and upon all the original order of reference herein of Hon. Justice George Starke dated June 19, 1970 and upon the said report of the Hon. Gerald Mazur, Special Referee dated June 29, 1971, it is

ORDERED, that defendant's motion to reject the report of Hon. Gerald Mazur, Special Referee, dated June 29, 1971 is hereby denied and, it is further

ORDERED, that the plaintiff's cross-motion to confirm the report and for other relief is hereby granted and it is further

ORDERED, that the defendant's motion heretofore held in abeyance by the earlier order of this Court dated June 19, 1970 be and the same hereby is denied and it is further

ORDERED, that Gustave Simons is substituted as party plaintiff in this action and that the title of this case is amended to read as follows:

"SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

1234/69

GUSTAVE SIMONS,

Plaintiff,

- against -

ALLAN H. APPLESTEIN,

Defendant.

(Filed September 8, 1971)

and it is further

ORDERED, that this action is hereby restored to the Trial Term Part I Day Calendar of this Court for the 9th day of September 1971 and the plaintiff is directed to serve a copy of this Order with Notice of Entry upon the Calendar Clerk of Trial Term, Part I, within 10 days of the granting of this Order, and it is further

ORDERED, that a copy of this order with notice of entry be served on the Clerk of the Court who is directed to change the records accordingly.

Enter

/s GS

J. S. C.

SUPREME COURT OF THE STATE OF NEW YORK
SPECIAL TERM PART I, NEW YORK COUNTY
at the Courthouse thereof, 60 Centre Street,
New York, New York 10007

Present:

Hon. Hilda G. Schwartz
Justice.

GUSTAVE SIMONS
— against —

ALLAN H. APPLESTEIN

(Filed August 1, 1972)

The following papers numbered 1 to 12 read on this motion, submitted

No. 60 on Calendar of June 14, 1972

	Papers Numbered
Notice of Motion pleadings, exhibit and Affidavits Annexed	1-5
Answering Affidavit	6
Replying Affidavit and exhibit	7-8
Rejoinder Affidavit and exhibits	9-12

Motion by plaintiff for an order permitting the plaintiff to amend his complaint in the form proposed is disposed of as follows:

Plaintiff by his proposed amended complaint seeks to increase the damages claimed from $33,579.33 to 383,599.33 including disbursements, as the reasonable value of legal services rendered to the defendant and to substitute two new causes of action for this larger amount, which proposed causes of action accrued over twelve years ago.

Although leave to amend is freely given, the court must determine the nature of the amendment, the time it is made, the possible prejudice to the adverse party and the justification offered by the amending party. It is apparent that at this late stage of the proceedings, some seven years after the verification of the complaint, prejudice to the defendant would be caused by granting this relief. The motion is, accordingly, denied.

Dated July 31, 1972

County Clerk's No. 12349, 1964
Spec I Liber S15 Line 5, 1972

New York Supreme Court
County of New York

INDIVIDUAL CALENDAR PART 61

PRESENT:

Hon. WILLIAM MERTENS
Justice.

GUSTAVE SIMONS
— against —

ALLAN H. APPLESTEIN

(Filed July 31, 1975)

Exhibit		Papers Numbered
Notice of Motion and Affidavits	Annexed	1-3
Answering Affidavits & Exhibits		4-10
Replying Affidavit & Exhibit		11-12
Rejoinder Affidavits & Exhibits		13-16

Notice of Examination and Pleadings — Exhibit

Stipulation — Referee's Report — Minutes

As the Court reads the extensive papers on this motion for a new trial it can only marvel at the sheer audac-

ity of a defendant who when testifying at the trial denied a certain conviction in Florida and whose moving papers on this motion show the utter falsity of his testimony at the trial. The attempt of counsel in his supplemental brief (p. 4) to claim confusion of incidents on the part of the defendant in so testifying at the trial is meaningless in view of the failure to submit any affidavit by the defendant himself. The matter of the Florida conviction was appropriately disposed of by the Court at the trial of this ancient matter. Suffice to say that the defendant was his own worst witness and the jury on the record before it could easily, and with ample justification in the record, resolve the issue of credibility against the defendant as it did without any reference to the Florida conviction which defendant denied at the trial and which the Court instructed the jury to disregard. There is no basis for the instant motion and it is denied in all respects.

Dated July 29, 1975.

J.S.C.

Briefs: Defendant's

County Clerk's No. 12349, 1964,

Kupferman, J.P., Murphy, Lupiano, Lane, JJ.
2978-79

Gustave Simons,
Plaintiff-Respondent, A.B.Glenn
—against—

Allen H. Applestein,
Defendant-Appellant. S.I.Sokolsky

Judgment, Supreme Court, New York County (Mertens, J.), entered on March 27, 1975, in favor of plaintiff after a jury trial and the order of said Court entered on July 31, 1975, denying defendant's motion for a new trial, unanimously affirmed. Respondent shall recover of appellant $60 costs and disbursements of these appeals.

The critical question presented in this action to recover for legal services rendered and disbursements incurred by plaintiff's former law firm involved the nature of the legal representation undertaken and the contingency upon the happening of which a fee was to be paid. Resolution of that issue in favor of plaintiff is supported by the record. We have examined appellant's contentions, inter alia, that he was prejudiced by an inquiry into his violation of a Florida municipality's ordinance and the receipt of files relating to a prior litigation and find them lacking in merit.

Order filed.

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on October 12, 1976.

Present—Hon. Theodore R. Kupferman, Justice Presiding,
Francis T. Murphy, Jr.,
Vincent A. Lupiano,
Myles J. Lane, Justices.

2978-79

Gustave Simons,
Plaintiff-Respondent,

—against—

Allen H. Applestein,
Defendant-Appellant.

Appeals having been taken to this Court by the defendant-appellant from a judgment of the Supreme Court, New York County (Mertens, J.), entered on March 27, 1975, in favor of plaintiff against defendant in the total sum of $68,156.20, and from an order of said court entered on July 31, 1975, denying defendant's motion for a new trial, and said appeal having been argued by Mr. Sol I. Sokolsky of counsel for the appellant, and by Mr. Arnold Bennett Glenn of counsel for the respondent; and due deliberation having been had thereon, and upon the memorandum decision of this Court filed herein,

It is unanimously ordered that the judgment and order so appealed from be and the same hereby are affirmed. Respondent shall recover of appellant $60 costs and disbursements of these appeals.

ENTER: HYMAN W. GAMSO
Clerk.

Supreme Court, U. S.
FILED
MAY 2 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1976.

No. 76-1364

ALLAN H. APPLESTEIN,
Petitioner,

vs.

GUSTAVE SIMONS,
Respondent.

Brief in Opposition to Petition for a Writ of Certiorari to the Court of Appeals of the State of New York.

ARNOLD BENNETT GLENN
Counsel of Record for Respondent
575 White Plains Road
Eastchester, N. Y. 10707
(914) 793-1700

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In the

Supreme Court of the United States

October Term, 1976.

Allan H. Applestein,

Petitioner,

vs.

Gustave Simons,

Respondent.

Brief in Opposition to Petition for a Writ of Certiorari to the Court of Appeals of the State of New York.

Statement.

The tortured recital by petitioner in discussing the nature of the case and of the facts underlying it ignores the basic issue herein.

In short, this is an action brought by an attorney at law of the State of New York to recover for professional legal services rendered on a *quantum meruit* basis against one who was a non-resident at the time the action was commenced. The petitioner came to New York City and was resident there staying at an apartment there for some length of time. Petitioner, an attorney at law and graduate of Harvard Law School, perceived an opportunity (outside the field of law) to acquire control of a company located in New York (Amos Parrish & Co.) but the acquisition of the company depended upon having a number of circumstances fall into place and which required the institution and maintenance of two separate law actions in the Federal Courts of New York (Southern

District). The petitioner engaged respondent's then law firm (respondent being the successor to the law firm) in New York City on a contingent basis. The two actions were commenced in the Federal Courts in New York and were successful. The respondent thereafter was discharged as petitioner's attorney. The petitioner later moved to Florida, prior to the respondent's having sued petitioner for the value of legal services rendered.

Respondent obtained an order of attachment under the New York *ex parte* attachment statute and the sheriff levied upon a bank account of the petitioner. While attempting to complete service of the summons and complaint in Florida, the petitioner advised the process server (the local sheriff in Florida) that he was out of town but that he would appear in the court proceeding in lieu of service of the summons and complaint. Accordingly, the petitoner in November, 1964, timely appeared in the action (by eminent counsel) and answered the complaint by verified answer. The answer contained, in effect, a general denial, and raised no affirmative or jurisdictional defenses.

By formal motion Special Term ruled upon the question of whether the New York court had obtained *in personam* jurisdiction or solely *in rem* jurisdiction (over the minimal attached property). The court ruled that jurisdiction was *in personam*. An appeal was taken therefrom and the Appellate Court unanimously affirmed said ruling on March 3, 1975. Immediately thereafter, a jury trial was had and a judgment was entered in favor of the respondent on March 27, 1975. Appeal was taken therefrom (no mention of the claim of supposed lack of *in personam* jurisdiction was made therein) and said judgment was unanimously affirmed. Permission was sought from the New York Court of Appeals to appeal said judgment and in addition an appeal was

taken (under a claim of right) to the Court of Appeals on the *in personam* question on constitutional grounds, which applications were both denied and the denial of the appeal on constitutional grounds is here sought to be reviewed.

ARGUMENT.

The Court Below Properly Determined That Jurisdiction Over the Answering Non-resident Defendant Was *In Personam* and Not Limited to the Attached *Res*.

POINT I.

The non-resident defendant's answer to the complaint subjected him to *in personam* jurisdiction.

Prior to the 1969 amendments, CPLR 320 (c) denied any right to a limited appearance.

The drafters of the CPLR expressly recognized this. Fourth Preliminary Report Advisory Committee on Practice and Procedure. Leg. Doc. No. 20 188-89 (1960). The defendant whose property was attached had two choices: No defense and lose the attached property or defend and risk a full *in personam* judgment.

After *Simpson v. Loehman*, 21 N. Y. 2d 305, 234 N. E. 2d 669, 287 N. Y. S. 2d 633 (1947), reargument denied 21 N. Y. 2d 990, 238 N. E. 2d 319, 290 N. Y. S. 2d 914 (1968), the Judicial Conference in 1969 adopted CPLR Rule 320 (c) permitting for the first time a limited appearance.

Historically, prior to the enactment of CPLR Rule 320 (c), the limited appearance was not sanctioned in attachment cases. *Perlak v. Goodyear Tire & Rubber Co.*, N.O.R., 140 N. Y. S. 2d 675, 677, wherein Mr. Justice Martuscello stated:

> "The defendant, by interposing an answer joining issue on the merits has waived any objection it has to the jurisdiction of the Court to render a judgment in personam."

The Court cited with approval *Brainard v. Brainard,* 272 App. Div. 575, 74 N. Y. S. 2d 1, affirmed 297 N. Y. 916, 79 N. E. 2d 744; *Olcott v. Maclean,* 73 N. Y. 223, 225; *Dembo v. Stasig,* 285 App. Div. 16, 135 N. Y. S. 2d 376.

This procedure has been found to be constitutionally permissible, *Brainard v. Brainard, supra.* See also *Cheshire National Bank v. Jaynes,* 224 Mass. 14, 112 N. E. 500 (1916).

To place the matter in proper historical perspective, after *Seider v. Roth,* 17 N. Y. 111, 269 N. Y. S. 2d 99, held that the New York Courts could acquire *in rem* jurisdiction over a non-resident defendant by attachment of his liability insurance policy issued by a New York carrier, *Simpson v. Loehman, supra,* held that where the attached *res* was a liability insurance policy, a limited appearance was possible by the liability insurance carrier, who, after all, was the real party in interest, controlling the litigation and paying the judgment. *Simpson v. Loehman, supra,* made this determination prior to the 1969 Amendments to CPLR Rule 320 (c). A commentator states that one of the reasons for the amendment to CPLR Rule 320 (c) was to terminate the judge made law that was emerging in this area (citing *Tjepkema v. Kennedy,* 31 A. D. 2d 908, 298 N. Y. S. 2d 175, another *Seider* type case. Weinstein-Korn-Miller §320 18 [a]).

It can hardly be disputed that the law in New York under the Civil Practice Act and later under the CPLR, in 1964 when this action was commenced and under the CPLR until Rule 320 (c) was amended in 1969 was that a defendant could not make a special or limited appearance in a quasi in rem action, to defend the attached res. This also was and continues to be the law in other states. Weinstein-Korn-Miller §320 .17 and .18 depending merely on policy considerations a state may choose to follow, scarcely rising to a constitutional, due process mandate. See also *U. S. v. Balanovski,* 236 F. 2d 298, 302, cert. den. 352 U. S. 968.

> "The parties cannot complain of inconvenience since they have come into the jurisdiction, they have had their day in Court on the issues which would settle both the right to the funds and personal liability. There is no constitutional problem."

As another commentator has stated in discussing the amendment to CPLR Rule 320 (c): "The amendment became effective on September 1, 1969 * * *." As to defendants who have already appeared in such actions before September 1, a distinction has to be made. In *Seider v. Roth* case, it has been clear since *Simpson v. Loehman, supra,* that the defendant always had the right to make a limited appearance. As to defendants in other attachment cases, however, presumably they had no right to make a limited appearance before September 1, 1969, and, accordingly, their appearance before that date constituted a submission to in personam jurisdiction which will not be divested by the amendment." Prof. McLaughlin's commentaries to McKinney's Book 7B, CPLR §320, page 374. In *Minichello v. Rosenberg,* 410 F. 2d 106, cert. den. 396 U. S. 844, in which the constitutionality of the *Seider v. Roth* procedure was upheld, the Court's opinion at page 111 in note 7 points out that there is a considerable split among the states and commentators, as to whether

it is unfair to require a defendant to submit to in personam jurisdiction or else forfeit the in rem *res*. But, it cites only two law review articles as taking the more extreme position that due process is thereby violated, i. e., Taintor, Foreign Judgments in Rem, 8 U. Pitts, L. R. 233 (1942), and B. Currie, Attachment and Garnishment in the Fed. Courts, 59 Mich. L. R. 337 (1961), but also cites, to the contra, Restatement of Judgments, §40 (1942).

A reading of Proposal No. 1 of the Judicial Conference in its report to the 1969 Legislature in relation to the CPLR clearly indicates that the new CPLR Rule 320 (c) was based on policy considerations, i. e., "wisdom and fairness" rather than any perceived constitutional mandate.

As was stated by the committee in its final paragraph

> "The Committee is fully aware that problems of *res judicata* (collateral estoppel) are bound to arise as a result of the proposed amendment. It will be the traditional task of the Courts to work out these problems on a case by case basis • • •."

The careful "case by case" basis evolutionary development recommended by the Judicial Conference is hardly consistent with the appellant's position that the amendment was intended to have, and should be given the broad and immediate impact of retroactivity thereby opening the judicial floodgates to a wave of claims attacking the validity of the pre-amendment attachments.

Retroactive operation of statutes is not favored by Courts and will not be given such construction unless the language expressed or by necessary implication requires it. *People ex rel. Beck v. Graves,* 280 N. Y. 405, 410 (1939).

In fact, with the limited exception of *Podolsky v. Devinney,* 281 F. Supp. 488, no other decision can be found which squarely holds that a defendant in any kind of quasi-in-rem action has a constitutional due process right to make a limited appearance. This was a *Seider-Roth* type of attachment following the initial *Simpson v. Loehman* decision, 21 N. Y. 2d 305. This decision was followed by the motion to reargue in *Simpson v. Loehman, supra,* which motion was denied by the Court of Appeals at 21 N. Y. 2d 990 in its now famous memorandum decision which then announced the limited appearance rule in *Seider v. Roth* type cases.

Thus, *Podolsky v. Devinney, supra,* involved a new and controversial attachment situation that is patently different from other kinds of historically approved quasi-in-rem attachments, but, at page 17 of petitioner's petition, the argument is made that any distinction between the result reached in *Simpson v. Loehman,* and other cases other than *Seider v. Roth* types would be an unconstitutional denial of equal protection. This case is factually different from the case at bar since the only nexus therein was the fortuitous issuance of an insurance policy by a New York licensed insurer. Here, all contacts were within New York and involved legal services performed by a New York attorney within New York State on which CPLR 302 in personam jurisdiction could have been based.

The Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same. *Safeway Stores, Inc., v. Oklahoma Retail Grocers Assoc.,* 360 U. S. 334; *Merchants Refrigerating Co. v. Taylor,* 275 N. Y. 113.

The decision in *Simpson v. Loehman* makes it quite clear that the Court recognized a fundamental difference between the *Seider v. Roth* type of attachment and other more conventional types. As was stated by the Court of Appeals in *Simpson v. Loehman* at pages 990, 991.

> "Consideration of CPLR 320 (c) and its effect on other types of actions begun by attachment must, of course, await future cases."

In its initial decision, the Court emphasized the unusual and unique element present in a *Seider v. Roth* situation. The insurer is in control of the litigation. The Court in *Minichiello v. Rosenberg, supra,* amplifies the point. In a *Seider-Roth* case the insured is merely a nominal defendant, the real defendant being the insurance carrier. To require the insurance carrier to submit to full in personam jurisdiction created a constitutionally unacceptable result. See also *Rintala v. Shoemaker,* 362 F. Supp. 1044, 1054, n. 19 (D. C. Minn. 1973). In other more conventional attachment situations, some property of the defendant (not the insurance carrier's property) is located within the State providing a more direct nexus and justification for in personam jurisdiction over the defendant. See also *Ownbey v. Morgan,* 256 U. S. 94.

In *U. S. Industries, Inc., v. Gregg,* 540 F. 2d 142, 147, the defendant [Gregg] relied upon the Supreme Court's classic formulation of the constitutional limits to state court jurisdiction.

> [D]ue process requires only that in order to subject a defendant to a judgment *in personam,* if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend "traditional

> notions of fair play and substantial justice." *Milliken v. Meyer,* 311 U. S. 457, 463 [61 S. Ct. 339, 85 L. Ed. 278].
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> • • •
>
> Whether due process is satisfied must depend • • • upon the quality and nature of the activity in relation to the fair and orderly administration of the laws which it was the purpose of the due process clause to insure. That clause does not contemplate that a state may make binding a judgment *in personam* against an individual or corporate defendant with which the state has no contacts, ties, or relations.
>
> *International Shoe Co. v. Washington,* 326 U. S. 310, 316, 319, 66 S. Ct. 154, 158, 160, 90 L. Ed. 95 (1945).

The petitioner herein comes clearly within those guidelines; *viz*: he was physically in New York, engaged New York attorneys to assist him in obtaining control of a New York based company, instituted two lawsuits in New York to accomplish same.

Therefore, under CPLR 302, petitioner was *always* subject to New York *in personam* jurisdiction by virtue of New York's "long arm" statute.

Based upon precedents such as *Ownbey v. Morgan, supra,* and *Central Loan & Trust Co. v. Campbell,* 173 U. S. 84, 19 S. Ct. 346, 43 L. Ed. 623, and the factual pattern here (which is in conformity with the guidelines of *Milliken v. Meyer, supra,* and *International Shoe Co. v. Washington, supra*), the New York courts properly held that jurisdiction was obtained *in personam* and the arguments raised by petitioner as to violations of due process and equal protection are in reality "straw men" without vitality or substance.

The petitioner's contacts with New York State were certainly more than the "minimum contacts" required by *Milliken v. Meyer, supra.*

Clearly, Fourteenth Amendment requirements of minimum contacts are present in this garden variety of commercial litigation which scarcely rises to a problem of constitutional import.

Petitioner, an attorney and represented by eminent counsel, voluntarily appeared and defended the action, never formally, in the *pleadings,* ever raising the question of lack of *in personam jurisdiction.* At the time the answer was interposed, this was tantamount to personal service within the jurisdiction giving *in personam* jurisdiction. Assuming, *arguendo,* but not conceding, that petitioner had the right to contest *in personam* jurisdiction, he consciously waived same by appearing and defending on the merits. *D. H. Overmyer Co., Inc., of Ohio v. Frick Co.,* 405 U. S. 174, 92 S. Ct. 775, 31 L. Ed. 2d 124.

Indeed, petitioner's conduct in not raising the issue at the trial, but permitting, nay inducing, respondent to proceed at the vigorously contested trial, smacks of entrapment and should not be countenanced.

This ancient matter should be disposed of once and for all. The petitioner has had his day in court but refuses to admit it, impeding and delaying the collection of the judgment awarded.

As has been stated:

> "To everything there is a season, there is a time to every purpose under the heaven. A time to get, and a time to lose."

The petitioner has lost but refuses to admit this fact.

CONCLUSION.

The petition of the petitioner for a writ of certiorari to the Court of Appeals of the State of New York should be denied with costs.

Respectfully submitted,

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